

**KENTUCKY PERSONNEL BOARD
MINUTES OF JANUARY 10, 2014**

1. The regular monthly meeting of the Kentucky Personnel Board was called to order by Chairman Doug Sapp on January 10, 2014, at approximately 9:30 a.m., 28 Fountain Place, Frankfort, Kentucky.

Board Personnel Present:

Wayne "Doug" Sapp, Chairman
Larry B. Gillis, Vice Chairman
David B. Stevens, Member
David F. Hutcheson, Jr., Member
Tommy W. Chandler, Member
Donald W. "Don" Blevins, Member
Ramona Herndon, Member
Mark A. Sipek, Executive Director and Secretary
Boyce A. Crocker, General Counsel
Linda R. Morris, Administrative Section Supervisor
Cynthia Perkins, Administrative Specialist

2. **READING OF THE MINUTES OF REGULAR MEETING HELD DECEMBER 13, 2013**

The minutes of the last Board meeting had been previously circulated among the members. Chairman Sapp asked for additions or corrections. Mr. Gillis moved to approve the minutes, as submitted. Mr. Hutcheson seconded and the motion carried 7-0. The Board members signed the minutes.

3. **EXECUTIVE DIRECTOR'S REPORT**

Mr. Sipek stated that the Board has a full agenda and he would keep his report brief.

Mr. Sipek noted that Judge Tommy Chandler was reappointed to the Personnel Board and was sworn in by the Hon. Boyce A. Crocker, General Counsel, prior to the beginning of the meeting. Chairman Sapp expressed his gratitude to Judge Chandler for returning for a second term on the Board.

At the conclusion of Mr. Sipek's report, Chairman Sapp called for the Personnel Cabinet's report.

4. **PERSONNEL CABINET'S REPORT**

The Hon. Dinah Bevington, Executive Director, came forward to present the Personnel Cabinet's report.

Ms. Bevington mentioned that W2s will be mailed and postmarked by January 31, 2014.

Requested Changes to 101 KAR 1:325, Initial Probationary Periods:

Ms. Bevington advised that prior to approving extended probationary periods, the Cabinet's Compensation and Classification Branch reviews the requests to ensure they are the only agency using that classification and whether the classification is consistent with others in that series.

After some discussion, Mr. Hutcheson moved to accept the amendments to 101 KAR 1:325. Dr. Stevens seconded and the motion carried 7-0.

At the conclusion of the Personnel Cabinet's report, Chairman Sapp called the parties forward for oral argument.

5. **ORAL ARGUMENTS**

A. Paul Holbrook v. Justice and Public Safety Cabinet (Corrections) (2012-156)

Present for oral arguments were counsel for the Appellant, Hon. Elmer George, and counsel for Appellee, the Hon. Amber Arnett. After presenting oral arguments, the parties answered questions from the Board.

B. Paula Watts v. Cabinet for Health and Family Services (2012-255)
(Request by Appellant - **Request Withdrawn**)

6. **MOTIONS**

A. Wade Hester v. Cabinet for Health and Family Services (2012-271)
--Appellee's Motion to File Late Exceptions

Mr. Blevins moved to deny Appellee's Motion to File Late Exceptions. Mr. Gillis seconded and the motion carried 7-0.

7. INVESTIGATIONS

- A. Request for investigation referred by Executive Branch Ethics Commission against Public Service Commission **Tabled from December meeting**
--Response of Public Service Commission

The Hon. Katie Gabhart, General Counsel for the Executive Branch Ethics Commission, and Mr. Jeff Derouen, Executive Director for the Public Service Commission, were present.

After some discussion, Mr. Hutcheson moved to investigate this matter. Mr. Gillis seconded and the motion carried 7-0.

- B. Anonymous Request for investigation against Department of Agriculture
--Response of Department of Agriculture

The Hon. Holly VonLuehrte, Chief of Staff, and the Hon. Dan Egbers, contract attorney for the Department of Agriculture were present.

After some discussion, Judge Chandler moved to decline investigation of this matter. Mr. Hutcheson seconded and the motion carried 7-0.

8. CLOSED SESSION

Mr. Blevins moved that the Board go into Executive Session for the purposes of discussing complaints, proposed or pending litigation, and deliberations regarding individual adjudications. Ms. Herndon seconded. Chairman Sapp stated that the motion had been made and seconded for the Personnel Board to retire into closed Executive Session, passed by a majority vote of the members present, with enough members present to form a quorum. Pursuant to KRS 61.810(1) (c), (f), and (j), the Kentucky Open Meetings Act, the Board will now retire into closed Executive Session. Specific justification under the Kentucky Open Meetings Act for this action are as follows, because there will be discussion of proposed or pending litigation against or on behalf of the Board; and deliberations regarding individual adjudication. The motion carried 7-0. (10:30 a.m.)

Mr. Hutcheson moved to return to open session. Dr. Stevens seconded and the motion carried 7-0. (11:15 a.m.)

9. **CASES TO BE DECIDED**

The Board reviewed the following cases. At that time, the Board considered the record including the Hearing Officers' findings of fact, conclusions of law and recommendations, any exceptions and responses which had been filed, and oral arguments where applicable.

A. Paul Holbrook v. Justice and Public Safety cabinet (Corrections) (2012-156)

Mr. Blevins moved to note Appellee's exceptions and oral arguments and to defer this matter to the next Board meeting. Dr. Stevens seconded and the motion carried 7-0.

B. Paula Watts v. Cabinet for Health and Family Services (2012-255)

Mr. Gillis moved to note Appellant's motion for oral argument (withdrawn) and Appellee's response and to accept the recommended order dismissing the appeal. Ms. Herndon seconded and the motion carried 7-0.

C. Wade Hester v. Cabinet for Health and Family Services (2012-271)
Deferred from December meeting

Mr. Hutcheson moved to accept the Final Order sustaining the appeal to the extent a five-day suspension was reduced to a two-day suspension, as attached to the minutes. Judge Chandler seconded and the motion carried 7-0.

D. Ashley Lewis v. Cabinet for Health and Family Services (2013-028)
Deferred from December meeting

Mr. Hutcheson moved to note Appellant's exceptions and Appellee's response and to accept the Final Order sustaining the appeal, as attached to the minutes. Mr. Gillis seconded and the motion carried 7-0.

E. Debra Vahle v. Cabinet for Health and Family Services (2012-148)
Deferred from December meeting

Judge Chandler moved to note Appellant's exceptions, Appellee's response and oral arguments and to accept the Final Order sustaining the appeal to the extent the dismissal was rescinded and modified to a thirty-day suspension, as attached to the minutes. Dr. Stevens seconded and the motion carried 7-0.

F. Robert Bray v. Justice and Public Safety Cabinet (Corrections) (2013-027)

Ms. Herndon moved to accept the recommended order dismissing the appeal. Dr. Stevens seconded and the motion carried 7-0.

G. Linda Carnes v. Transportation Cabinet (2012-102)

Mr. Gillis moved to accept the recommended order dismissing the appeal. Ms. Herndon seconded and the motion carried 7-0.

H. Patricia Crawford v. Justice and Public Safety Cabinet (Juvenile Justice) (2013-109)

Mr. Hutcheson moved to accept the recommended order dismissing the appeal. Judge Chandler seconded and the motion carried 7-0.

I. Steven Crawford v. Justice and Public Safety Cabinet (Corrections) (2013-072)

Mr. Gillis moved to accept the recommended order dismissing the appeal. Mr. Blevins seconded and the motion carried 7-0.

J. Stacy Johnson v. Transportation Cabinet (2013-185)

Judge Chandler moved to accept the recommended order dismissing the appeal. Mr. Gillis seconded and the motion carried 7-0.

K. Paul Scott v. Finance and Administration Cabinet (2013-015)

Mr. Hutcheson moved to accept the recommended order dismissing the appeal. Dr. Stevens seconded and the motion carried 7-0.

Show Cause Orders – Responses Filed

The following case had a show cause order entered by the hearing officer recommending that the appeal be dismissed for failure to timely prosecute unless a statement was filed by the Appellant stating sufficient cause to excuse their failure to appear at the scheduled hearing. Appellant filed a response to the show cause order and Appellee filed a Response to Appellant's Statement.

L. Walter Rafferty v. Justice and Public Safety Cabinet (2013-081)

Mr. Blevins moved to remand this matter back to the active docket for further proceedings. Judge Chandler seconded and the motion carried 6-1, with Mr. Hutcheson opposing.

Show Cause Orders - Appeals Dismissed – No Response Filed

The following cases had a show cause order entered by the hearing officer recommending that the appeals be dismissed for failure to timely prosecute unless a statement was filed by the Appellants stating sufficient cause to excuse their failure to appear at the scheduled hearing. There were no responses submitted by the Appellants to the show cause orders.

- M. Dale Honeycutt v. Department of Veterans' Affairs
- N. Joseph Serpico v. Justice and Public Safety Cabinet (Corrections)
- O. Brandon Smith v. Justice and Public Safety Cabinet (Corrections)
- P. Diane Williams v. Cabinet for Health and Family Services
- Q. Joanna Wood v. Justice and Public Safety Cabinet (Juvenile Justice)

Dr. Stevens moved to find that the Appellants had not responded to the show cause orders and that the recommended orders be accepted *en bloc* dismissing the appeals for failure to timely prosecute the appeals. Ms. Herndon seconded and the motion carried 7-0.

10. WITHDRAWALS

Mr. Blevins moved to consider the following withdrawals of appeals *en bloc* and to accept the withdrawals and dismiss the appeals. Ms. Herndon seconded and the motion carried 7-0.

- A. Charles Ray Kitchen v. Tourism, Arts and Heritage Cabinet (Parks)
- B. Denisha Johnson v. Cabinet for Health and Family Services (2 appeals)

11. SETTLEMENTS

Mr. Hutcheson moved to accept the settlements *en bloc* as submitted by the parties, and to sustain the appeals to the extent set forth in the settlements. Mr. Blevins seconded and the motion carried 7-0.

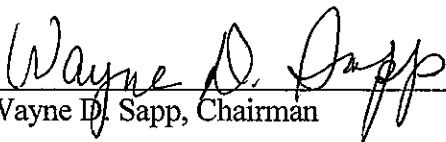
- A. Novella Epperson v. Cabinet for Health and Family Services
- B. Pamela Farmer v. Finance and Administration Cabinet
- C. Kassondra Harris v. Cabinet for Health and Family Services (mediated)
- D. Darin Wilder v. Justice and Public Safety Cabinet (Corrections)

12. **OTHER**

Mr. Sipek stated that the proposed amendments to KRS 18A.0551, Personnel Board Elections – Procedures, would be postponed until after the current election is completed in late June 2014.

Mr. Hutcheson advised that staff should be given direction to investigate the matter referred by the Executive Branch Ethics Commission. Chairman Sapp stated that staff should inform the Ethics Commission of the Board's approval to investigate and to present a plan of action at the next Board meeting.


There being no further business, Mr. Gillis moved to adjourn. Ms. Herndon seconded and the motion carried 7-0. (11:30 a.m.)

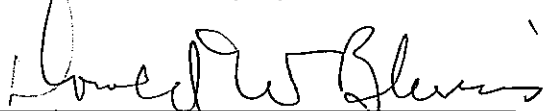

Wayne D. Sapp, Chairman

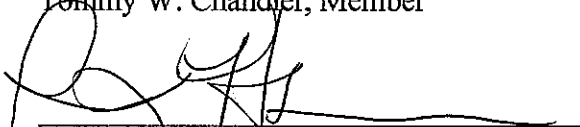

Larry Gillis, Vice Chairman


David B. Stevens, Member


David F. Hutcheson, Jr., Member


Tommy W. Chandler, Member


Donald W. Blevins, Member


Ramona Herndon, Member

COMMONWEALTH OF KENTUCKY
PERSONNEL BOARD
APPEAL NO. 2012-271

WADE HESTER

APPELLANT

V. FINAL ORDER SUSTAINING
HEARING OFFICER'S FINDINGS OF FACT,
CONCLUSIONS OF LAW AND RECOMMENDED ORDER
AS ALTERED

CABINET FOR HEALTH AND FAMILY SERVICES,
J. P. HAMM, APPOINTING AUTHORITY

APPELLEE

** **

The Board at its regular January 2014 meeting having considered the Appellee's Motion to File Exceptions Out of Time, and being duly advised,

IT IS HEREBY ORDERED that the Appellee's Motion to File Exceptions Out of Time is DENIED. (See KRS 13B.110(4).)

The Board at its regular January 2014 meeting having considered the Findings of Fact, Conclusions of Law and Recommended Order of the Hearing Officer dated October 24, 2013, Appellee's Motion to File Exceptions Out of Time, and being duly advised,

IT IS HEREBY ORDERED that the Findings of Fact, Conclusions of Law and Recommended Order of the Hearing Officer be altered as follows:

A. Delete Background paragraph 8, and substitute the following:

8. Young interviewed Appellant on September 19, 2012, and he told her that the background checks for himself and his daughter were to be provided for a list of people qualified to provide respite care for individuals who cared for disabled people. She felt he was not very forthcoming in the interview. He provided the name of the person to be assisted, but did not indicate that person was his stepson. He stated that the other individual he attempted to obtain the background checks on had provided their information through Dorothy Nash, the mother of the

disabled child he was to work with, but did not say that Nash was his wife. Appellant did not run background checks as part of his job duties.

B. **Delete** Finding of Fact paragraph 4, and substitute the following:

4. The Appellant had two prior verbal warnings and one prior written reprimand. The written reprimand was for working on an IT project without a work ticket.

C. **Delete** Conclusion of Law number 1, and substitute the following:

1. Although the evidence established the Appellant had two prior verbal warnings and one prior written reprimand, no evidence suggested these previous actions warranted any enhancement of the penalty for the Appellant's current transgression.

D. **Delete** Conclusion of Law number 3, and substitute the following:

3. The Board concludes that a five-day suspension is excessive, given the Appellant's misconduct. The Board concludes that a two-day suspension is the appropriate action. This is consistent with the discipline received by the employee who obtained the records for the Appellant.

E. **Delete** the Recommended Order and substitute the following:

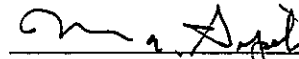
IT IS FURTHER ORDERED that the Hearing Officer's Recommended Order be altered and that the appeal of **WADE HESTER VS. CABINET FOR HEALTH AND FAMILY SERVICES (APPEAL NO. 2012-271)** be **SUSTAINED** to the extent that the five day suspension without pay be reduced to a two-day suspension without pay. The Appellant should receive appropriate back pay and benefits. In addition, the Appellee is ordered to reimburse the Appellant for any leave time he used attending the hearing and any pre-hearing conferences at the Board, and to otherwise make the Appellant whole. **KRS 18A.105, KRS 18A.095(25) and 200 KAR 12:030.**

IT IS FURTHER ORDERED that the Findings of Fact, Conclusions of Law and Recommended Order of the Hearing Officer, as altered, be and they hereby are approved, adopted and incorporated herein by reference as a part of this Order and that the Appellant's appeal be **SUSTAINED to the extent** therein.

The parties shall take notice that is Order may be appealed to the Franklin Circuit Court in accordance with KRS 13B.140 and KRS 18A.100.

SO ORDERED this 14th day of January, 2014.

KENTUCKY PERSONNEL BOARD



MARK A. SIPEK
SECRETARY

A copy hereof this day mailed to:

Hon. Tim Salansky
Mr. Wade Hester
Mr. J. P. Hamm

COMMONWEALTH OF KENTUCKY
PERSONNEL BOARD
APPEAL NO. 2013-028

ASHLEY LEWIS

APPELLANT

VS. **FINAL ORDER ALTERING HEARING OFFICER'S
FINDINGS OF FACT, CONCLUSIONS OF LAW, AND
RECOMMENDED ORDER**

**CABINET FOR HEALTH AND FAMILY SERVICES,
J. P. HAMM, APPOINTING AUTHORITY**

APPELLEE

** ** *

The Board at its regular January 2014 meeting having considered the Findings of Fact, Conclusions of Law and Recommended Order of the Hearing Officer dated November 19, 2013, having noted Appellant's exceptions, Appellee's response to exceptions, and being duly advised,

IT IS HEREBY ORDERED that the Findings of Fact, Conclusions of Law and Recommended Order of the Hearing Officer be altered as follows:

A. **Delete** Findings of Fact, paragraphs 9 through 12, and substitute the following:

9. The Board finds the testimony of witnesses Soliah Nelson and Sharon Spencer to be unreliable and specifically finds the testimony of Appellant as to the ultimate question of whether she diluted Resident #1's orange juice or coffee to be persuasive. Having so found, the Board finds that those allegations in the disciplinary letter have no merit.

10. The Board finds that no testimony was presented from Josephine Morris or Donna Davis regarding allegations attributed to them in the disciplinary letter and lacking evidence finds those allegations have no basis.

11. The Board finds allegations attributed to statements made by Dr. Vance were not proven, as Dr. Vance offered no testimony. It is of course the Appellee's burden of proof to establish the allegations charged in the disciplinary letter.

12. The Board finds, as noted above, the Appellant's denials of the allegations against her to be persuasive and thus finds that the disciplinary action taken was unwarranted.

B. **Delete** Finding of Fact paragraph 14 and substitute the following:

14. Bingham Gardens has a "zero tolerance" policy, which Karen Henderson described as meaning that the facility does not tolerate any abuse, and that every employee signs off on the policy. She produced a copy of the zero tolerance policy, which Ashley Lewis signed on August 12, 2012, acknowledging that she received a copy of the policy, and that she read it and understood it. (Appellee's Exhibit 16.)

C. **Delete** Conclusions of Law, paragraphs 3 through 8 and substitute the following:

3. Bingham Gardens Operational Practices policy number OP-1000.02.6, defines neglect as: "A situation in which an adult is unable to perform or obtain for himself the goods or services that are necessary to maintain his/her health or welfare, or the deprivation of services by a caretaker . . ." There is no question from the evidence that Resident #1 fit the description of one who was "unable to perform or obtain for himself" and greatly was dependent on his DSP, and, as pointed out by Director Klein in his termination letter, Resident #1 was a risk for dehydration.

4. While the Board is mindful and sensitive to the Appellee's oft-stated reliance and adherence to a "zero tolerance" policy regarding patient abuse or neglect, and the need to take disciplinary action should investigation substantiate allegations of abuse or neglect in one of the facilities it operates, the Board is also mindful that such allegations must be proven at evidentiary hearing per KRS Chapter 13B and KRS Chapter 18A.

5. Based on the Findings of Fact, as altered above, the Board concludes that as a matter of law of the Appellee, Cabinet for Health and Family Services, failed to carry its burden of proof by a preponderance of the evidence to demonstrate that Appellant committed the allegations as alleged in the disciplinary letter. Both determination of the Hearing Officer and the Board that the testimony presented by Nelson and Spencer was unreliable and the lack of any testimony from Josephine Morris, Donna Davis or Dr. Vance, who are attributed as sources of allegations against Appellant in the disciplinary letter, leads the Board to conclude the charges must fail.

C. **Delete** the Recommended Order, and substitute the following:

IT IS HEREBY ORDERED that the appeal of **ASHLEY LEWIS VS. CABINET FOR HEALTH AND FAMILY SERVICES (APPEAL NO. 2013-028)** be **SUSTAINED** and that the dismissal of the Appellant be rescinded, and that she be restored to her previous position as Patient Aide II, or a position of like pay and status. The Board further **ORDERS** that Appellant shall be awarded back pay and benefits pursuant to KRS 18A.095(22), and to otherwise be made whole. KRS 13B.120, KRS 18A.105, and 200 KAR 12:030.

IT IS FURTHER ORDERED that the Findings of Fact, Conclusions of Law and Recommended Order of the Hearing Officer as Altered be, and they hereby are, approved, adopted and incorporated herein by reference as a part of this Order and the Appellant's appeal is **SUSTAINED herein.**

The parties shall take notice that this Order may be appealed to the Franklin Circuit Court in accordance with KRS 13B.140 and KRS 18A.100.

SO ORDERED this 14th day of January, 2014.

KENTUCKY PERSONNEL BOARD



MARK A. SIPEK, SECRETARY

A copy hereof this day mailed to:

Hon. Michael Boylan
Hon. Jennifer Wolsing
J. P. Hamm

**COMMONWEALTH OF KENTUCKY
PERSONNEL BOARD
APPEAL NO. 2012-148**

DEBRA L. VAHLE

APPELLANT

**FINAL ORDER
ALTERING HEARING OFFICER'S
VS. FINDINGS OF FACT, CONCLUSIONS OF LAW
AND RECOMMENDED ORDER**

**CABINET FOR HEALTH AND FAMILY SERVICES,
J. P. HAMM, APPOINTING AUTHORITY**

APPELLEE

** ** *

The Board at its regular January 2014 meeting having considered the Findings of Fact, Conclusions of Law and Recommended Order of the Hearing Officer dated November 14, 2013, having considered Appellant's exceptions, Appellee's response to exceptions, oral arguments of the parties, and being duly advised,

IT IS HEREBY ORDERED that the Findings of Fact, Conclusions of Law and Recommended Order of the Hearing Officer be altered as follows:

- A. **Delete** Background, paragraphs 34 and 35.
- B. **Renumber** Background paragraphs 36, 37, 38, 39, 40, 41 and 42 to 34, 35, 36, 37, 38, 39, and 40.
- C. **Delete** Background, paragraph 39 (now renumbered paragraph 37), and substitute the following:

37. She testified and offered documentary confirmation that she had received "Outstanding" evaluations from 2004 through 2010, and a "Highly Effective" evaluation in 2011. She testified she had 23 years of unblemished service with the Commonwealth (with the exception of a one-day suspension for using a co-worker's computer access code), working at times as a Public Assistance Program Specialist, Branch Manager, and a Training Officer for Medicaid Services.

D. **Delete** Findings of Fact, paragraph 2, and substitute the following:

2. The Board finds the testimony of Anna S., Frankie Stivers, Connie L., Stephanie Creech, Kelly Mahoney, Lori G., Jillian Deuser, and Danny G. to be credible.

E. **Add** Findings of Fact, paragraphs 5 and 6, as follows:

5. The Board, however, finds that the Appointing Authority's refusal to consider Appellant's largely exemplary work record, and his failure to consider her performance evaluations because of a so-called "zero tolerance" policy regarding falsification of records was not appropriate in this case. The Board finds that taking Appellant's previous work record and performance evaluations into account, that the punishment of dismissal was excessive and not taken with just cause. The Board finds a lesser punishment would serve to correct the misconduct.

6. The Board finds that while not determinative of any issues in the appeal, that the Appellee's failure to take adequate steps to have preserved the "P-drive" records at the time of its investigation troubling. The Board notes that Appellant's "U-drive" files were apparently produced to her in preparation for the evidentiary hearing. In general, the Board finds it troubling that at the time an agency is undertaking an investigation of serious matters such as these, that it would not make every effort to immediately preserve and protect evidence, especially information on computer drives which may later prove crucial in a determination of the matter.

F. **Delete** Conclusion of Law, paragraph 2, and substitute the following:

2. The Board concludes the decision to terminate the employment of Appellant, Debra Vahle, was taken without just cause and was excessive in light of the surrounding circumstances, including Appellant's long exemplary employment history. The Board concludes that a blind adherence to "zero tolerance," even for serious matters such as falsification of records, does not serve the agency well, or the citizens of the Commonwealth.

G. **Delete** the Recommended Order, and substitute the following:

IT IS HEREBY ORDERED that the appeal of **DEBRA L. VAHLE VS. CABINET FOR HEALTH AND FAMILY SERVICES (APPEAL NO. 2012-148)** be **SUSTAINED** to the extent that the dismissal of the Appellant be rescinded, and Appellant be restored to her

previous position as Public Assistance Program Specialist, or a position of like pay and status. The Board further **ORDERS** that the penalty be modified to a 30-day suspension without pay, such suspension having already been served by virtue of her termination. Appellant shall be awarded back pay and benefits pursuant to KRS 18A.095(22), subject to offset for the 30-day unpaid suspension, and to otherwise be made whole. KRS 13B.120, KRS 18A.105, and 200 KAR 12:030.

IT IS FURTHER ORDERED that the Findings of Fact, Conclusions of Law and Recommended Order of the Hearing Officer as Altered be, and they hereby are, approved, adopted and incorporated herein by reference as a part of this Order and the Appellant's appeal is **SUSTAINED to the extent** stated above.

The parties shall take notice that this Order may be appealed to the Franklin Circuit Court in accordance with KRS 13B.140 and KRS 18A.100.

SO ORDERED this 14th day of January, 2014.

KENTUCKY PERSONNEL BOARD



MARK A. SIPEK, SECRETARY

A copy hereof this day mailed to:

Hon. Jennifer Wolsing
Hon. Paul Fauri
J. P. Hamm